No. 3682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, THIRTY-TWO OIL COMPANY, L. B. McMURTRY, J. M. McLEOD and STANDARD OIL COMPANY,
Appellees.

REPLY BRIEF FOR THE UNITED STATES

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We desire to consider in this reply the contention of appellees under the heading IV, beginning on page 33 of their brief.

It is contended by counsel that it does not affirmatively appear from the record that all of the testimony upon which the decree was based is before this Court. The following stipulation was signed by counsel for all parties:

Stipulation Re Statement of Evidence on Appeal.

It is hereby stipulated and agreed that the statement of evidence lodged by the plaintiff, United States of America, with the clerk of the above-entitled Court on the 18th day of August, 1920, may be approved by the Court or the Judge as the statement of evidence to be included in the transcript on appeal taken by said plaintiff in the above-entitled and numbered cause to the United States Circuit Court of Appeals.

Dated April 4th, 1921. (R. 116-117.)

This stipulation was filed April 22, 1921 (R. 117). Based upon this stipulation the following certificate was signed by the Court:

Certificate of Judge to Statement of Evidence.

It appearing that the foregoing statement of the evidence to be included in the record on appeal to the Circuit Court of Appeals for the Ninth Circuit is full, true, complete and properly prepared pursuant to stipulation filed herein this day, the same is hereby approved.

Dated April 22, 1920.

BLEDSOE,
Judge. (R. 929.)

The certificate of the Clerk of the District Court to the transcript, in so far as it is of importance here, reads as follows:

I, CHAS. N. WILLIAMS, Clerk of the District Court of the United States of America,

in and for the Southern District of California, do hereby certify the foregoing eight hundred and four (804) typewritten pages, numbered from 1 to 804, inclusive, and comprised in one volume to be a full, true and correct copy of the amended bill of complaint, answer of defendant California Midway Oil Company, answer of defendants 32 Oil Company and J. M. McLeod, answer of defendant L. B. McMurtry, decree of dismissal, petition for appeal, assignment of errors, order allowing appeal, stipulation re statement of evidence, statement of evidence and praecipe for transcript in the above and therein entitled cause, and that the same together constitute the record in said cause, as specified in the said praecipe, filed in my office on behalf of the United States of America, plaintiff and appellant, by its attorneys of record, with the exception of the answer of defendant Columbus Midway Oil Company, which is specified in said praecipe, but which was not filed in the above entitled action. I further certify that the original citation on appeal is hereto attached and made a part of said record. (R. 931-932.)

This certificate is dated April 30, 1921.

The practice is usual for the parties or their attorneys to stipulate what the transcript shall contain. A consent that the bill of exceptions be settled has been construed as a written stipulation that the document contains a sufficient transcript of the evidence and proceedings below (*Dodge v. Norlin,* 133 Fed. 363, 369). The Court, based upon the

stipulation, certified that the "foregoing statement of the evidence is "full, true, complete and properly prepared." It has been held that a certificate that the "foregoing is a true, full and complete record in the above entitled cause" is sufficient (*Pennsylvania Co. v. Jacksonville T. & K. W. Ry. Co.*, 55 Fed. 131, 132).

The Clerk certified the record to be a "full, true and correct copy of the * * * stipulation re statement of evidence, statement of evidence and praecipe for transcript in the above and therein entitled cause." Based on such a showing counsel states that "it is clear that it does not affirmatively appear in this record that the statement of the evidence contains all of the evidence upon which the lower court based its decree" (Appellees' Brief, p. 35).

Equity Rule 76 provides that if in the transcript anything material to either party be omitted by accident or error the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript. Such a suggestion or application, made within a reasonable time after the record is printed, will usually be granted (*Bein v. Heath,* 142 U. S. 704, 35 L. Ed. 1174). No such suggestion or application has ever been made here. There is nothing in the record to indicate that the statement of the evidence is not full, true and complete. So far as the record itself is concerned, it shows upon its face that it is

full, true and complete. The cases cited by counsel are not in point because they are all cases where it was apparent from the face of the record that all of the evidence was not in the record.

It is also stated by counsel:

> Nor does it affirmatively appear that the statement of the evidence in this record is the statement that was lodged with the clerk on August 18, 1920, the statement which counsel for the respective parties stipulated could be used. (Appellees' Brief, p. 35.)

The stipulation of April 4, 1921, specifically refers to the statement of evidence lodged with the Clerk on the 18th of August, 1920. The certificate of the Judge makes specific reference to the stipulation, and the use of the word "foregoing" in the certificate shows that it was attached to the statement lodged with the Clerk on the 18th of August, 1920. The inclusion by the Clerk of the certificate of the Judge in the record shows affirmatively that the statement of the evidence in this record is the statement that was lodged with the Clerk on August 18, 1920. Unless there is a showing to the contrary, it is to be presumed that the "statement of evidence" referred to in the certificate of the Clerk is the statement lodged with him on August 18, 1920. If it can be shown that the statement of the evidence in the record is not the statement lodged with the Clerk on August 18, 1920, then it is the duty of counsel to do so.

Counsel not having availed themselves of the opportunity offered by Equity Rule 76, and not having shown that the statement of the evidence in the record is not the statement lodged with the Clerk on August 18, 1920, it is to be presumed that the record before this Court contains all of the testimony upon which the decree was based.

Respectfully submitted,

RAYMOND BENJAMIN,

CHARLES D. HAMEL,

Special Assistants to the Attorney General,
Solicitors for Appellant.